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OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C.
1940 DUKE STREET
ALEXANDRIA, VA 22314

EXAMINER	
TRAN LIEN, THUY	

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/083,387
Filing Date: February 27, 2002
Appellant(s): SAKAI ET AL.

Richard L. Chinn
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed July 12, 2004.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 1, 3-20 and 22 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

6,042,866	GREEN et al.	3-2000
6,004,611	GOTOH et al.	12-1999
5,916,619	MIYAZAKI et al.	6-1999

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 4-7,11-14, 16-20 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Greene et al in view of Gotoh et al.

Greene et al disclose a method of preparing fried noodles. The method comprises the steps of preparing a dough, passing the dough through one or more sets of roller to configure the dough into a sheet, cutting the sheet into strips, steaming the strips, molding the steamed strips into cake formation and frying the caked noodle. The noodles are made of wheat flour and other ingredients such as Kansui solution, gum, maltodextrin etc. are added. The noodles are fried at a temperature of 125-160 degree C for a time of 15-70 seconds. (See columns 2-5 and example 1).

Greene et al do not disclose frying the noodles in the oil having the characteristics of claims 1,3-7, 19, the laminating step of claim 16 and the types of noodle in claim 18.

Gotoh et al edible oils which contain 1,3-diglycerides in an amount of at least 40%, preferably at least 45% and more preferably at least 50%. The oil is substitutable for conventional cooking oil. The oil inhibits the increase of blood triglyceride, is little accumulated in the body and is excellent in storage stability and flavor. The number of carbon atoms of the fatty acid components constituting the diglycerides is 12-24. (See columns 2-3)

It would have been obvious to one skilled in the art to fry the Greene et al noodles in the oil disclosed by Gotoh et al to obtain the benefits disclosed by Gotoh because Gotoh et al disclose the oil is substitutable for conventional cooking oil. The Gotoh et al oil has the same properties as the claimed oil. Thus, when the noodles are fried in the Gotoh et al, they will have the properties cited in claims 1 and 21 because such properties are obtained by frying the noodles in the oil as claimed and the oil disclosed by Gotoh et al is the same as claimed. It would also have been obvious to laminate the dough depending on the thickness desired in the dough sheet; laminating, rolling, sheeting and slitting in noodle strands are all conventional steps in making instant fried noodles as recognized by applicant in the specification. It would have been obvious to use any conventional method to make the noodle strips. It would have been obvious to make any type of noodles into fried instant noodles, by following the

conventional steps of forming noodle strips, steaming and frying, if the taste of fried noodles is desired.

Claims 8-10 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Greene et al in view of Gotoh et al as applied to claims 1, 3-7, 11-14, 16-20 and 22 above, and further in view of Miyazaki et al.

Greene et al do not disclose adding an antioxidant in the amount and the type of antioxidant claimed and adding egg powder.

Miyazaki et al disclose a method of making fried instant noodles in which additives such as antioxidant, egg are added. (See col. 5 lines 1-5)

It would have been obvious to add antioxidant and egg because such additives are common in fried instant noodles as shown by Miyazaki et al. Adding additives for their art-recognized function would have been obvious to one skilled in the art. The amount of antioxidant is a result-effective variable and can readily be determined by one skilled in the art; it would have been obvious to add an amount that show effective function as an antioxidant. It would have been obvious to add any known antioxidant and all the antioxidants claimed are well known in the art.

(11) Response to Argument

On page 4 of the appeal brief, appellant argues there is no disclosure or suggestion of the preparation of instant fried noodles in Gotoh et al; thus there can be no suggestion or expectation of improved texture of instant fried noodles. This argument is not persuasive. The Gotoh et al reference is not used alone in the rejection; it is used in combination with the Green et al reference and it is not relied

upon to show the preparation of fried instant noodles. The Gotoh et al reference is relied upon for the teaching of a general purpose oil containing at least 40% diglyceride. The oil in Gotoh et al is disclosed to have health benefits and is excellent in storage stability and flavor as disclosed on column 2 lines 36-43). The oil is used in the same way as conventional oil including deep-frying as shown in example 4. Greene et al teach to fry noodles in oil and do not restrict the oil to any type. The teaching of Greene et al clearly suggests to one skilled in the art that any conventional oil can be used. In view of the teaching of Gotoh et al, one would be motivated to use the oil of Gotoh et al for the precise reason disclosed by Gotoh et al even if one is unaware of any additional benefit not disclosed. If the oil can be used for deep frying and stir frying, it can be used for frying noodles because all consist of frying. The difference resides in the amount of oil used and the time of frying, not in the use of different oil. There is no specific oil which is only used for making fried instant noodles. Appellant further argues Greene et al fail to teach the claimed diglyceride oil composition and thus have no suggestion of preparation of fried instant noodles with improved texture. Appellant's argument clearly ignores the way the rejection is set out. If Greene et al disclose the claimed diglyceride oil, the rejection would not have been an obviousness rejection. Even if one is totally unaware of the improved texture or any other additional benefit, one would still have been motivated to use the Gotoh et al oil in the method of Greene et al for the precise reason set by forth by Gotoh et al. Appellant has not set forth any argument for why it would not have been obvious for one skilled in the art to not use the Gotoh et al oil in preparing the noodles disclosed by Greene et al.

When the Gotoh et al oil is used to fry the noodles disclosed by Greene et al, it is obvious the improved texture is obtained because the same type of oil is used in the same type of product.

On page 5 of the appeal brief, appellant argues Miyazaki et al fail to disclose or suggest a method of heating noodles in a fat composition comprising at least 60% of diglyceride. The Miyazaki et al is not relied upon for the teaching of the oil; thus, this argument does not address the issue at hand.

On page 6 of the appeal brief, appellant set forth comparative data of four different oils containing different amounts of diglycerides. The result is shown in table 2. It is not clear what conclusion can be reached from the data. Appellant does not explain how parameters such as smoothness and elasticity are evaluated. There is no objective measurements to show striking differences in the four oil samples. The measurement of texture is quite subjective. What might be considered as smooth and elastic to one might not be so to others. On page 7 of the appeal brief, appellant argues the noodles made by the claimed method of heating in oil containing at least 60% is superior in regards to its smoothness and elasticity compared to those noodles heated in oil disclosed by Gotoh et al. In making this argument, appellant ignores the other teaching of Gotoh et al. The oil of Gotoh et al contains 40% or above of diglyceride ; claims 1-2 of the patent claim an amount of 40-90% and 40-80% of diglyceride. Thus, the claimed amount of at 65% and at least 70% is disclosed by Gotoh et al. Therefore, no unexpected result is seen in the claimed amount.

On pages 8-9, appellant argues the claims of Group II and III which appellant contends show unexpected result and are separately patentable from the other claims. The amounts of diglyceride of 65% and70% fall within the range disclosed and claimed by Gotoh et al.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

LIEN TRAN
PRIMARY EXAMINER
Group1702

Lien Tran
September 26, 2004

Conferees

OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C.
1940 DUKE STREET
ALEXANDRIA, VA 22314

MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700

Glenn Caldarola
Supervisory Patent Examiner
Technology Center 1700